UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MERCY, INC. d/b/a AMR LAS VEGAS Employer	:	Case No. 28-RC-239046
and AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES AFSCME LOCAL 4041 Petitioner	:	

EMPLOYER'S MOTION FOR RECONSIDERATION OF BOARD'S ORDER DENYING EMPLOYER'S REQUEST FOR REVIEW

As the employer in the above-captioned case, Mercy, Inc. d/b/a AMR Las Vegas (hereafter, "AMR" or the "Company") hereby requests the Board reconsider the Board's Order denying AMR's Request for Review and, upon reconsideration, vacate the Order and grant the Request for Review.

BACKGROUND

Just over a year ago, on August 1, 2019, AMR filed with the Board a Request for Review (hereafter, the "Request for Review") in connection with the Regional Director's determination to hold the above-captioned case in abeyance pending the resolution of a related Unfair Labor Practice Charge (hereafter, the "Charge") filed by the Petitioner, American Federation of State County and

Municipal Employees AFSCME Local 4041 (AFSCME Local 4041, EMS Workers United-AFSCME) (hereafter, the "Union"). See Case No. 28-CA-241256.[1] Put simply, through the Request for Review, the Company requested that the Board reconsider the agency's blocking charge policy, and argued the Regional Director's abeyance determination was capricious and arbitrary because he allowed a hearing on the Union's election objections to go forward in spite of the Charge only to later place the representation proceeding in abeyance because of the Charge. See Request for Review, pages 7 – 10.

On December 9, 2019, the Board issued an Order (hereafter, the "Order") by which the Request for Review was denied. At the same time, however, the Board noted as follows:

> ***We are troubled by the processing of the petition and the associated delay. It is peculiar to block a rerun election based on the conduct warranting a rerun election. It is also difficult to understand why there has been no further action by the Regional Director on the unfair labor practice charge since the decision to hold the petition in abeyance, notwithstanding the existence of the Hearing Officer's Report, which would typically provide a basis for making a merit determination.***
>
> See Order, fn. 1 (emphasis added).

In spite of the Board's comments, the remainder of December, all of January, all of February, all of March, and nearly all of April would go by before

[1] The allegations set forth by the Charge, which was filed on May 10, 2019, parallel election objections that were filed by the Union on May 7, 2019.

the Regional Director, at last, took some action on the Charge. On April 29, 2020, in the absence of any previous notice a merit determination had even taken place[2], the Regional Director presented AMR with a proposed settlement agreement. On May 13, 2020, the Company tendered a counteroffer on settlement, which was summarily rejected without any explanation the next day. On May 29, 2020, the Regional Director issued a Complaint (hereafter, the "Complaint") in which he adopted all of the allegations set forth by the Charge, along with most of the allegations set forth by one other Unfair Labor Practice Charge. See Case No. 28-CA-246344. The Complaint was accompanied by a Notice of Hearing but one that did not include an actual hearing date. Instead, the Regional Director determined that the hearing would take place on "a date to be determined," and today, more than two months later, the parties inexplicably remain without a date for the hearing.

ARGUMENT

The Regional Director's delay is indefensible. The simple fact of the matter is that, well before the Order was even issued by the Board in December of last year, the Regional Director possessed more than enough evidence to make a determination on the Charge. Specifically, the Regional Director had the record

[2] See NLRB Casehandling Manual, Part 1, Unfair Labor Practice Proceedings (July 2020), Section 10128.2(a) ("[o]nce a merit determination has been made in a case, the Board agent should inform all parties of that determination, . . .")

from a three-day hearing on the Union's election objections, which he viewed as related to the Charge. In other words, by the Regional Director's own view of things, the record from the objections hearing would have contained the evidence necessary to make a merit determination on the allegations set forth by the Charge. Nonetheless, nearly a year would go by between the day the record was closed on the objections hearing on May 23, 2019 and the day that the Regional Director finally revealed a merit determination *via* the settlement he proposed to the Company on April 29, 2020.[3] And even now, despite the fact the Board was "troubled" by the delay that existed as of December of last year (see Order, fn. 1), the proceedings on the Charge remain frozen as the Regional Director has failed to schedule a date for the hearing on the Complaint.[4]

---

[3] Needless to say, AMR recognizes the fact the virus outbreak has affected the agency's normal operations. However, the Board did not inform the public of any effect the virus had on the agency before March 12, 2020, and even then, made clear that "the Agency continues to function as normal and will continue its work enforcing the National Labor Relations Act." https://www.nlrb.gov/news-outreach/news-story/nlrb-directs-washington-dc-headquarters-employees-to-temporarily-telework. Accordingly, any contention that the virus outbreak explains the delay with the disposition of the Charge would clearly be a *post hoc* excuse.

[4] Here too, the virus pandemic is no excuse for the delay. Before the Complaint was issued on May 28, 2020, the Division of Judges announced that unfair labor practice hearings would resume effective June 1, 2020. https://www.nlrb.gov/news-outreach/news-story/division-of-judges-will-resume-trials-effective-june-1-2020.

From the day the representation petition was filed with the Regional Director, AMR has taken every available step to expedite the representation proceeding. The Company obviated the need for a pre-election hearing by entering into a Stipulated Election Agreement, whereby AMR agreed to a prompt election. In the case of the professional employees, who opted for an election of their own and voted in favor of representation by the Union, the Company did not pursue any objections, but rather, honored the employees' choice. In the case of the non-professionals, who voted in opposition to representation by the Union, the Company attempted to move the proceedings along by foregoing any exceptions to the hearing officer's report on the Union's objections. More recently, the Board, itself, undertook efforts to accelerate the proceedings by virtue of the concern expressed in the Order over the "peculiarity" of the manner in which the Regional Director was processing the petition.

And yet, virtually no progress has been achieved thus far and, given the Regional Director's penchant for unnecessary delay, there is no reason to believe that progress will be achieved any time soon. In the meantime, the only guarantee for AMR, the Union and the employees is ongoing uncertainty, as they all continue to have no resolution to the question of whether the Union will serve as the employees' collective bargaining representative. The Regional Director's decision to leave the parties in this state of flux does not effectuate the purposes of the Act.

CONCLUSION

For all the reasons above, AMR respectfully requests that the Board reconsider the Order, and upon reconsideration, vacate the Order, grant the Request for Review and instruct the Regional Director to schedule a new election as promptly as the agency's rules allow and certify the outcome immediately thereafter.

Dated: Glastonbury, CT
August 4, 2020

Respectfully submitted,

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP
Attorney for Mercy, Inc. d/b/a AMR Las Vegas
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bcarmody@carmodyandcarmody.com

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

MERCY, INC. d/b/a AMR LAS VEGAS Employer *and* AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES AFSCME LOCAL 4041 Petitioner	:	Case No. 28-RC-239046

CERTIFICATE OF SERVICE

The Undersigned, Bryan T. Carmody, being an Attorney duly admitted to the practice of law, does hereby certify, pursuant to 28 U.S.C. § 1746, that, on August 4, 2020, the Employer's Motion for Reconsideration of the Board's Order Denying the Employer's Request for Review was served upon the following *via* email:

Cornele Overstreet
Regional Director, Region 28
2600 North Central Avenue, Suite 1400
Phoenix, AZ 85004
cornele.overstreet@nlrb.gov

Martin & Bonnett, P.L.L.C.
Attorney for Petitioner
Attention: Jennifer Kroll, Esq.
4647 North 32nd Street, Suite 185
Phoenix, AZ 85018
jkroll@martinbonnett.com

Dated: Glastonbury, CT
August 4, 2020

/s/_____

Bryan T. Carmody, Esq.
Carmody & Carmody, LLP
Attorney for Mercy, Inc. d/b/a AMR Las Vegas
134 Evergreen Lane
Glastonbury, CT 06033
(203) 249-9287
bcarmody@carmodyandcarmody.com